87-403

No. - .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1987.

FEDERAL PACIFIC ELECTRIC COMPANY, INC.,
PETITIONER,

v.

PATRICIA DIGHTON, GEORGE P. DIGHTON, PPA, CHRISTOPHER DIGHTON, PPA, LESLIE ABBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES ABBOTT, RICHARD STAFFORD, ADMINISTRATOR OF THE ESTATE OF CASANDRA CHIMINELLO, GENERAL ELECTRIC COMPANY, KAISER ALUMINUM AND CHEMICAL CORP., LEVITON MANUFACTURING CO., INC., SERT, JACKSON & ASSOCIATES, INC., GEORGIA PACIFIC CORP. AND ARVIN INDUSTRIES, INC.,
RESPONDENTS.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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Question Presented.

Is Massachusetts General Law c. 260, § 2B, as enacted and as applied by the Massachusetts Supreme Judicial Court, violative of the Fourteenth Amendment of the United States Constitution as it deprives the petitioner of the equal protection of the laws?

List of Parties.

The parties to the two consolidated proceedings, below, in the Massachusetts Supreme Judicial Court and Massachusetts Superior Court were:

Plaintiffs.

a. Patricia Dighton — Alleging personal injuries as a result of burns.

b. Christopher Dighton — Alleging personal injuries as a result of burns.

c. George Dighton — Alleging psychic or emotional injuries.

d. Leslie Abbott — Administratrix of the estate of James Abbott, a minor who the plaintiff alleges suffered personal injuries and wrongful death.

e. Richard Stafford — Administrator of the estate of Cassandra Chiminello, a minor who the plaintiff alleges suffered personal injuries and wrongful death.

Defendant.

f. Federal Pacific Electric Co., Inc. — Manufacturer of electrical components which plaintiffs allege caused a residential fire with resultant personal injury and death.

Third Party Defendants.

g. Sert, Jackson and Associates, Inc. — Architect responsible for design and specifications of the residence where the fire occurred.

h. Kaiser Aluminum and Chemical Corp. — Manufacturer of electrical wiring installed at the residence where the fire occurred.

i. Leviton Manufacturing Co., Inc. — Manufacturer of electrical outlets installed at the residence where the fire occurred.

j. Georgia Pacific Corp. — Manufacturer of decorative wood panelling installed at the residence where the fire occurred.

k. General Electric Co.* — Manufacturer of electrical outlets installed at the residence where the fire occurred.

l. Arvin Industries, Inc.* — Manufacturer of a portable electric heater which was alleged to be a cause of the fire at the plaintiffs' residence.

List of Parent Companies, Subsidiaries and Affiliates of the Petitioner Corporation.

Parent — Exxon Corporation.
Parent — Reliance Electric Company, Inc.
Petitioner — Federal Pacific Electric Company, Inc.

Subsidiaries.

1. Cornell Dubilier Electric Co., Inc.
   a. Cornell Dubilier Electric Co., Haiti, Ltd.
   b. Cornell Dubilier Electronics Co., Canada, Ltd.
   c. Cornell Dubilier Electronics Co., Taiwan, Inc.
2. Federal Pacific Electric/Cornell Dubilier Electric Germany, Inc.
3. Federal Pacific Electric de Mexico, Inc.
4. Federal Pioneer, Ltd.
   a. Federal Electric Ltd.
   b. Federal Pioneer — Extech, Ltd.
   c. La Compagnie Electrique Pioneer du Quebec, Inc.

*General Electric and Arvin Industries will soon be voluntarily dismissed from this action.

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PATRICIA DIGHTON, GEORGE P. DIGHTON, PPA, CHRISTOPHER DIGHTON, PPA, LESLIE ABBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES ABBOTT, RICHARD STAFFORD, ADMINISTRATOR OF THE ESTATE OF CASANDRA CHIMINELLO, GENERAL ELECTRIC COMPANY, KAISER ALUMINUM AND CHEMICAL CORP., LEVITON MANUFACTURING CO., INC., SERT, JACKSON & ASSOCIATES, INC., GEORGIA PACIFIC CORP. AND ARVIN INDUSTRIES, INC.,
RESPONDENTS.

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioner, Federal Pacific Electric Company, Inc., respectfully prays a Writ of Certiorari issue to review the judg-

ment and opinion of the Massachusetts Supreme Judicial Court entered in the above entitled proceeding on April 21, 1987.

Opinions Below.

The opinion of the Massachusetts Supreme Judicial Court is reported at 399 Mass. 687, 506 N.E.2d 509 (1987), and is reprinted in the appendix herein. The opinion is composed of two distinct components:

a. The Massachusetts Supreme Judicial Court upheld the allowance by the trial court of the architect Sert, Jackson and Associates' Motion for Summary Judgment which was premised upon M.G.L. c. 260, § 2B, the so-called "statute of repose". It is the petitioner's position that this portion of the opinion constitutes a final judgment and is for that reason. *inter alia*, susceptible to an appeal pursuant to 28 U.S.C. § 1257(2). (Because the second component of the judgment below is not susceptible of appeal, in the interest of judicial convenience and economy both components are consolidated into a petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3).)

b. The Massachusetts Supreme Judicial Court upheld the trial court's denial of petitioner's Motion for Summary Judgment against the plaintiffs based upon the same "statute of repose" (M.G.L. c. 260, § 2B). (The petitioner believes this component of the judgment below may be brought to this Court only via 28 U.S.C. § 1257(3) as it does not constitute a final judgment.)

Jurisdiction.

The petitioner invokes the jurisdiction of this Court pursuant to the provisions of 28 U.S.C. § 1257(3).

In the action below "the validity of a State statute [was] drawn in question on the ground of its being repugnant to the Constitution" and the "judgments or decrees rendered by the highest court of a State" were in favor of its validity. 28 U.S.C. § 1257.

As stated in the "Opinions Below" section above, petitioner concedes that one component of the lower court's opinion does not constitute a "final judgment." Petitioner nonetheless respectfully urges this Court, in its discretion, to consider all aspects of this case as they are inextricably interwoven and the interests of fairness, justice, and judicial economy are best served by so considering this matter.

Statute Involved.

MASSACHUSETTS GENERAL LAWS C. 260, §2B.

Limitation of Three Years in Certain Cases; Actions for Damages Arising Out of Improvements to Real Property.

Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced

more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

Statement of the Case.

This is an alleged personal injury/wrongful death/product liability case.

The plaintiffs' complaints allege that on November 18, 1980, a fire at 1[illegible]0 Old Ironside Way, Charlestown, Massachusetts, resulted in injuries to Ms. Patricia Dighton and her sons, George and Christopher. The fire also allegedly caused the deaths of Ms. Dighton's foster children, James Abbott and Cassandra Chiminello (A. 1-12).

On November 17, 1982, Ms. Dighton, in a related case, commenced an action against her landlord, against the general contractor which built her apartment building, against the contractor's surety, and against architect Sert, Jackson and Associates, Inc. ("Sert Jackson") (Suffolk County Superior Court Civil Action No. 58322). This action was settled by defendants other than Sert Jackson.

On November 18, 1983, Ms. Dighton, on her own behalf and on behalf of her children, brought suit against Federal Pacific Electric Company, Inc. ("Federal Pacific"), alleging negligence and breach of warranty in connection with a defective circuit breaker which she alleged caused the subject fire (Suffolk County Superior Court Civil Action No. 65216).

In a separate action, commenced on November 18, 1983, Leslie W. Abbott, administratrix of the Estate of James Abbott, and Richard Stafford, administrator of the Estate of Cassandra Chiminello, also commenced a similar action against Federal Pacific (Suffolk County Superior Court Civil Action No. 65217). All three actions have been consolidated.

On July 26, 1985, defendant, Federal Pacific, sought leave to implead Sert Jackson and other third-party defendants for contribution and indemnification.

Federal Pacific's motion to implead Sert Jackson and other third-party defendants was allowed on August 28, 1985.

The basis of Federal Pacific's third-party complaint against Sert Jackson is that:

a. Sert Jackson was the architect for the construction of the apartment complex wherein the alleged fire occurred;

b. Sert Jackson, in its role as architect, was negligent in its "general administration of an improvement to real property" in that it approved the use of Kaiser Aluminum aluminum wiring in conjunction with Leviton copper outlets when, in fact, copper wiring was originally specified; and

c. That this failure to enforce the installation of copper conductor wire rather than aluminum (or in the alternative "pig-tailing" of copper conductors from the receptacle bolts to the aluminum conductor cable) was the proximate cause of the fire, i.e., it is alleged the connection of aluminum wire to the copper or brass terminal lugs on the receptacles caused the fire.

The premises where this fire allegedly occurred was opened to use on or before July 23, 1971. The project was substantially completed before August 24, 1972. The Dighton plaintiffs have admitted that the premises at 120 Old Ironside Road, Charlestown, Massachusetts and the component parts thereof were substantially completed and/or built or assembled prior to December 31, 1970.

In both the Dighton and Abbott cases the third-party defendant, Sert Jackson, moved to dismiss Federal Pacific's third-party actions in accord with the time limitations imposed by M.G.L. c. 260, § 2B.

Those motions for dismissal were allowed by the Massachusetts Superior Court.

In both the Dighton and Abbott cases the defendant, Federal Pacific, moved to dismiss the plaintiffs' respective causes of action upon the same basis, M.G.L. c. 260, § 2B.

Federal Pacific's motions to dismiss were denied by the Massachusetts Superior Court which reported certain questions of law to the Massachusetts Appeals Court pursuant to Massachusetts Rules of Civil Procedure 64 (a copy of which is set out at page 12a of the appendix).

On March 28, 1986, Federal Pacific filed with the Massachusetts Appeals Court Notices of Appeal with respect to the Superior Court's allowance of Sert Jackson's Motions to Dismiss and denial of Federal Pacific's Motion to Dismiss.

Thereafter Federal Pacific moved to consolidate the appeals and for direct appellate review by the Massachusetts Supreme Judicial Court. Both motions were allowed.

The Massachusetts Supreme Judicial Court heard oral arguments on January 8, 1987.

The Supreme Judicial Court issued its decision on April 21, 1987.

It is from that decision, which affirmed the actions of the Superior Court, that this petition arises.

Reasons for Granting the Writ.

THE DISTINCTION BETWEEN THOSE ENTITIES AFFORDED PROTECTION BY M.G.L. C. 260, § 2B AND THOSE NOT PROTECTED IS ARBITRARY AND WITHOUT A RATIONAL BASIS. ACCORDINGLY THE PETITIONER HAS BEEN DEPRIVED OF THE EQUAL PROTECTION OF THE LAWS BY THE MASSACHUSETTS SUPREME JUDICIAL COURT'S APPLICATION OF THE SUBJECT STATUTE.

Succinctly, it is the position of the petitioner that M.G.L. c. 260, § 2B is violative of concepts of "equal protection" inasmuch as an arbitrary distinction exists between that class protected by said statute and that class not protected.

This so-called "statute of repose" which limits the liability of architects and builders should either be stricken entirely or interpreted in such a fashion as to protect a class of entities which is more broadly and rationally based.

In the case at bar, wherein the building in which the fire occurred was substantially completed more than six years before the action was commenced, the practical effect of M.G.L. c. 260, § 2B on the petitioner is two-fold:

a. Because the petitioner, as a supplier of building materials which were incorporated into the subject premises, is outside of the defined class it is afforded no protection by the statute, yet;

b. Because the architect, Sert Jackson, is within the defined class, the petitioner is unable to bring a contribution or indem-

nity action against Sert Jackson, even though Sert Jackson, on the facts, appears to be a viable joint tortfeasor.

Heretofore the leading Massachusetts case pertaining to M.G.L. c. 260, § 2B was *Klein* v. *Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982).

In *Klein* the Massachusetts Supreme Judicial Court set out the reasoning for the enactment of c. 260, § 2B, the so-called "statute of repose". The court stated:

> "The architect or contractor was confronted not only with an unlimited class of potential claimants, but also, in many instances, with an extension in duration of the liability for negligence." Comment, Limitation of Action Statutes for Architects and Builders, 18 Cath. U.L. Rev. 361, 363 (1969). An injury could occur many years after the architect or contractor had completed his work. . . . [T]hose involved in construction were subject to possible liability throughout their professional lives and into retirement.

Id., 386 Mass. at 708-09, 437 N.E.2d at 520 (footnote omitted).

All which the court stated in the foregoing passage is equally applicable to a manufacturer who supplies a construction component which becomes an integral part of a structure. Herein, if Federal Pacific does not enjoy the protection of M.G.L. c. 260, § 2B it too will be confronted "with an unlimited class of potential claimants . . . [and] an extension in duration of the liability for negligence." Federal Pacific also would be "subject to possible liability throughout [its life]." "An injury could occur many years after" the manufacture and installation of the subject circuit breakers. *Id.*

> Limiting the duration of liability is a well recognized public purpose. "There comes a time when [a defendant] ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim 'when evidence has been lost, memories have faded, and witnesses have disappeared.'" *Rosenberg* v. *North Bergen*, 61 N.J. 190, 201 (1972), quoting Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950).

Klein, supra, 386 Mass. at 709, 437 N.E.2d at 520 (footnote omitted).

Herein, while the contractor and architect who, arguably, misused Federal Pacific's product may "be secure in [their] reasonable expectation that the slate has been wiped clean," the similarly situated Federal Pacific may not be so "secure." *Id.*

Not only has "evidence . . . been lost, memories . . . faded and witnesses . . . disappeared" but because of the protection granted by c. 260 § 2B to the contractor and architect, after this passage of time, it seems unlikely Federal Pacific will be able to maintain an action for contribution and/or indemnity against these entities. *Id.*

There appears to be no rational nor reasonable basis for the arbitrary distinction between architects and builders who enjoy the protection of c. 260 § 2B, and suppliers who are not so protected.

It is respectfully suggested that the sole reason for such a distinction in Massachusetts is a stronger legislative lobbying effort by builders and architects than by suppliers. This theory finds support in the statement of the court in *Klein, supra*,

386 Mass. at 709, 437 N.E.2d at 520, to wit: "At the urging of those involved in the construction industry, the Legislature placed an absolute outer limit on the duration of this liability." See also *McClanahan* v. *American Gilsonite Co.*, 494 F.Supp. 1334, 1346 (D. Colo. 1980) as cited in *Klein, supra* at 709 n.9, 437 N.E.2d at 520 n.9.

Despite the court having determined in *Klein* that M.G.L. c. 260, § 2B is not violative of equal protection concepts, Federal Pacific suggests that the similarities in the situation between itself, as a supplier, and the builder and architect herein, are persuasive and that the class distinctions are arbitrary and without a rational basis.

While M.G.L. c. 260, § 2B may be founded upon a valid state interest, the arbitrary distinction between the builders and suppliers does not further any state interest. In similar cases at least nine jurisdictions have found such statutes unconstitutional. See 93 A.L.R.3d 1242, 1250, citing *Pacific Indemnity Co.* v. *Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977), *McClanahan* v. *American Gilsonite Co.*, 494 F.Supp. 1334 (D. Colo. 1980); *Shibuya* v. *Architects Hawaii, Ltd.*, 647 P.2d 276 (Hawaii 1982); *Henderson Clay Products, Inc.* v. *Edgar Wood & Assocs., Inc.*, 451 A.2d 174 (N.H. 1982); *Plant* v. *R.L. Reid, Inc.*, 313 So.2d 518 (Ala. 1975); *Fujioka* v. *Kam*, 514 P.2d 568 (Hawaii 1973); *Skinner* v. *Anderson*, 231 N.E.2d 588 (Ill. 1976); *Loyal Order of the Moose, Lodge 1785* v. *Cavaness*, 563 P.2d 143 (Okla. 1977); *Broome* v. *Truluch*, 241 S.E.2d 739 (S.C. 1978); *Hartford Fire Ins. Co.* v. *Osborn Plumbing & Heating, Inc.*, 225 N.W.2d 628 (Wis. 1975).[1]

[1] In citing those jurisdictions wherein "statutes of repose" have been deemed unconstitutional, the petitioner acknowledges, and respectfully directs the Court's attention to the fact that there is a conflict between the holdings of various jurisdictions regarding this issue and cites the following cases as indicative of same: *Carter* v. *Hartenstein*, 455 S.W.2d 918 (Ark. 1970); *Reeves* v. *Ille Electric Co.*, 551 P.2d 647 (Mont. 1976); *O'Connor* v. *Altus*, 303 A.2d

Succinctly, there is a virtual identity between the positions and situations of Federal Pacific and the architect and builder, as discussed in *Klein*, and accordingly the statutory distinction between the two classes is artificial and irrational.

In citing the difficulty of an architect or builder in exercising control over the finished structure the court in *Klein* stated:

> "[T]here exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement to immovable property by the owner, lessor, or tenant.[2] It is difficult for the architect or contractor to guard against such occurrences because, after the acceptance by the owner, the architect or contractor ordinarily has neither control of the improvement nor the right to enter or inspect the improvement." *Burmaster* v.

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329 (1973), aff'd, 335 A.2d 545 (N.J. 1975); *Howell* v. *Burk*, 568 P.2d 214 (N.M. 1977); *Hill* v. *Forrest & Cotton, Inc.*, 555 S.W.2d 145 (Tex. 1977); *Millis* v. *Southern Co. Services, Inc.*, 296 S.E.2d 579 (Ga. 1982).

[2] In urging that "statutes of respose" should be extended to suppliers, it has been pointed out:

> that a product's safe use for a substantial period of time is some indication that the product was not defective at the time of manufacture, sale or delivery, that there is a greater chance that external causes beyond the manufacturer's control contributed to the injuries occurring many years after the initial purchase, and that the passing time increases the seller's difficulty in constructing a valid defense because much of the evidence may be lost, destroyed, or otherwise beyond reconstruction.

Product-Caused Injury—Period of Action, 25 ALR4th 641, § 2 at 644. In fact numerous jurisdictions have so expanded "statutes of repose" or enacted similar statutes dealing specifically with product related injuries. See *Thornton* v. *Mono Mfg. Co.*, 425 N.E.2d 522 (Ill. 1981); *Dague* v. *Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

Gravity Drainage Dist. No. 2 of the Parish of St. Charles, 366 So.2d 1381, 1385-1386 (La. 1978). See *Freezer Storage, Inc.* v. *Armstrong Cork Co.*, 476 Pa. 270, 276 (1978); *Harmon* v. *Angus R. Jessup Assocs.*, 619 S.W.2d 522 (Tenn. 1981).

Id., 386 Mass. at 716, 437 N.E.2d at 524. See also *Cournoyer* v. *Massachusetts Bay Transportation Authority*, 744 F.2d 208, 211 (1st Cir. 1984).

This exactly describes Federal Pacific dilemma.

Federal Pacific "has neither control of the [circuit breakers and the panel in which they are inserted at 120 Old Ironside Way] nor the right to enter and inspect . . . [same]." *Id.*

Without a broader interpretation of c. 260, § 2B the manufacturer of a circuit breaker has virtually unlimited exposure. By the very nature of the product it becomes an integral part of the finished structure and it is unlikely the panel would be replaced during the lifetime of the structure.

In *Klein*, the court repeatedly makes reference to "those involved in construction" (e.g., see 386 Mass. at 708, 709, 710, 437 N.E.2d at 520-521) in describing that class afforded protection by M.G.L. c. 260, § 2B. Federal Pacific suggests that, at least with respect to the manufacture and supply of circuit breakers and panels, it too is a member of the class of "those involved in construction." Circuit breakers and panels are of absolutely no utility unless "involved in construction" and incorporated into a structure. In this light, it is clear that design of circuit breakers and panels is a "design or plan for the improvement of real estate." Federal Pacific suggests that the encouragement of experimentation with new designs in construction discussed in *Klein* is equally applicable to the design and manufacture of the components which form an integral part of said construction: "The Legislature enacted

G.L. c. 260, § 2B, to limit the liability of architects, engineers, contractors, *or others involved in the design, planning, construction, or general administration of an improvement to real property*." 386 Mass. at 720, 437 N.E.2d at 526 (emphasis added). Federal Pacific is so involved or is similarly situated.

It is the position of Federal Pacific that in light of the similar relationship of Federal Pacific and Sert Jackson to the construction industry, it is purely an arbitrary distinction, violative of the "equal protection" clause of the Fourteenth Amendment of the U.S. Constitution, that enabled the Superior Court to allow Sert Jackson's Motion to Dismiss while denying Federal Pacific's Motion to Dismiss presented on the same grounds.

Despite the fact Federal Pacific is so similarly situated, the Massachusetts Supreme Judicial Court's application of M.G.L. c. 260, § 2B arbitrarily excludes suppliers and materialmen from the class of entities immunized by c. 260, § 2B, without providing a rational basis for such exclusion.

In *Klein*, the court articulates the reason for the distinctions between architects and "a mass producer of *consumer goods*." 386 Mass. at 719, 437 N.E.2d at 525 (emphasis added). Federal Pacific suggests this distinction is not applicable herein as the breakers and panels produced by Federal Pacific should not be classified as "consumer goods."

Rather, these are electrical utility distribution components purchased by the electrical building trade and incorporated as integral service elements of real property. Such products are generally of no utility unless incorporated into a structure. They are easily differentiated from appliances or personal use items.

The only "basis" for excluding Federal Pacific from the protection of c. 260, § 2B should not be applicable to the Federal Pacific product and therefore, the distinction, as it pertains to Federal Pacific, is not founded upon a rational basis. Massachusetts General Laws c. 260, § 2B therefore de-

nies Federal Pacific equal protection of the laws and should therefore be stricken as violative of the Fourteenth Amendment.

While a statute of repose such as M.G.L. c. 260, § 2B may be generally founded upon a valid state or public interest, this arbitrary distinction between builders and suppliers does not further any state interest, and the statute, it is suggested, is therefore violative of the concepts of equal protection.

Beyond this it is unclear if c. 260, § 2B is even, generally, founded upon a valid state or public interest as the statute may encourage a builder or architect to perform in a less than workman-like manner, secure in the knowledge that he will be immune from liability after the passage of six years.

The allowance of Sert Jackson's Motions to Dismiss has had the practical effect that Federal Pacific will have no recourse to the courts to seek contribution or indemnity from Sert Jackson despite the fact that it may have actually been Sert Jackson's negligence which led to the plaintiff's damages.

The guiding principle often stated by this and other courts is that equal protection of the laws requires all persons be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459 (1937); *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U.S. 183 (1936); *Colgate* v. *Harvey*, 296 U.S. 404 (1934) (*overruled on another point in Madden* v. *Kentucky*, 309 U.S. 83 (1940)); *State Board of Tax Comrs.* v. *Jackson*, 283 U.S. 527 (1931); *Corporation Com. of Oklahoma* v. *Lowe*, 281 U.S. 431 (1930); *Takahashi* v. *Fish & Game Com.*, 30 Cal.2d 719, 185 P.2d 805 (1947), *rev'd on other grounds*, 334 U.S. 410 (1948); *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 184 N.E. 152 (1933); *Vigeant* v. *Postal Tel. Cable Co.*, 260 Mass. 335, 157 N.E. 651 (1927); *Mathison* v. *Minneapolis S.R. Co.*, 126 Minn.

286, 148 N.W. 71 (1914); *Walker* v. *Board of Supervisors*, 224 Miss. 801, 81 So.2d 225, *cert. den.*, 350 U.S. 887 (1955).

> The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarly situated. Protection is not protection unless it accomplishes this. Immunity granted to a class, however limited, having the effect to deprive another class, however limited, of a personal or property right is just as clearly a denial of equal protection of the laws of the latter class as if the immunity were in favor of, or the deprivation of right permitted to be worked against, a larger class.

16A Am. Jur. 2d, § 738 at 775-776, citing *Truax* v. *Corrigan*, 257 U.S. 312 (1921).

The subject statute effectively "classifies" those persons to whom it affords protection and those to whom it does not. In order that a classification avoid violation of the guaranty of equal protection the classification must not be capricious or arbitrary, but must be reasonable, *Stanton* v. *Stanton*, 421 U.S. 7 (1975), *later app.*, 552 P.2d 112 (Utah 1976), *vacated on other grounds*, 429 U.S. 501, *on remand*, 564 P.2d 303, *reh' den.*, 567 P.2d 625 (Utah 1977); *Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Johnson* v. *Robison*, 415 U.S. 361 (1974); *Baird* v. *Eisenstadt*, 405 U.S. 438 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971), *conformed to*, 94 Idaho 542, 493 P.2d 701 (1971); *Walters* v. *St. Louis*, 347 U.S. 231 (1954), and natural, *Nicol* v. *Ames*, 173 U.S. 509 (1899) and must have a rational basis, *Trimble* v. *Gordon*, 430 U.S. 762, 4 Ohio Ops. 3d 296 (1977); *Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *James* v. *Strange*, 407 U.S. 128 (1972); *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Levy* v. *Louisiana*, 391 U.S. 68, 88 S.Ct.

1509, *reh. den.*, 393 U.S. 898, 21 L.Ed.2d 185, 89 S.Ct. 65, *on remand*, 253 La. 73, 216 So.2d 818 (1968); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 9 Ohio Ops. 2d 321, 82 Ohio L.Abs. 312 (1959), in light of its purpose or objective, *Carrington* v. *Rash*, 380 U.S. 89 (1965).

As stated above it is the position of the petitoner that the classification resulting from M.G.L. c. 260, § 2B is arbitrary and capricious.

The petitioner respectfully suggests a legislature cannot arbitrarily create a class and make it binding on the courts so that they would be bound to accept such classification as a proper one. *Van Harlingen* v. *Doyle*, 134 Cal. 53, 66 P. 44 (1901); *Randolph* v. *State*, 117 Tex. Crim. 80, 36 S.W.2d 484 (1931). When properly attacked, a classification must disclose its rational basis. A discrimination is not to be supported by mere fanciful conjecture, *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459 (1937); *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934), and cannot stand as reasonable if it offends the plain standards of common sense, *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U.S. 459 (1937).

It is often stated that a classification must be based on some natural principle of public policy, *American Sugar Refining Co.* v. *Louisiana*, 179 U.S. 89 (1900). Reasonable classification implies action consistent with the legitimate interests of the state. *Takahashi* v. *Fish & Game Com.*, 30 Cal.2d 719, 185 P.2d 805 (1947), *rev'd*, 334 U.S. 410 (1948); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92 (1972).

It is difficult to imagine how any governmental interest is furthered by the arbitrary distinction between those protected by the statute and those not so protected. In fact, in the *Klein* case the Massachusetts Supreme Judicial Court has acknowledged that the promulgation and enactment of the statute were principally the result of an effective lobbying effort by those who are protected by the statute.

By conferring a special privilege on architects, engineers and builders the statute effectively deprives similarly situated entities of equal protection.

> In all cases, however, where a classification is made for the purpose of conferring a special privilege on a class, there must be some good and valid reason why that particular class should alone be the recipient of the benefit.[46] Under the Federal Constitution, distinctions in rights and privileges must be based on some reason not applicable to all.[47] But if there are other general classes situated in all respects like the class benefited by a statute, with the same inherent needs and qualities which indicate the necessity or expediency of protection of the favored class, and legislation discriminates against, casts a burden upon or withholds the same protection from the other class or classes in like situations, it cannot stand.

[46] *Champlin Refining Co.* v *Cruse*, 115 Colo 329, 173 P2d 213 [1946]; *Dibrell* v *Morris' Heirs*, 89 Tenn 497, 15 SW 87 [1891]; *Stratton Claimants* v *Morris Claimants*, 89 Tenn 497, 15 SW 87 [1891].

[47] *Harding* v. *People*, 160 Ill 459, 43 NE 624 [1896].

16A Am. Jur. 2d, § 788 at 928; *McErlain* v. *Taylor*, 192 N.E. 260 (Ind. 1934); *Abrams* v. *Bronstein*, 33 N.Y.2d 488, 354 N.Y.S.2d 926, 310 N.E.2d 528 (1974).

Conclusion.

For the foregoing reasons, *inter alia*, the petitioner contends that it has been denied equal protection of the laws by the

Massachusetts Supreme Judicial Court's application of M.G.L. c. 260, § 2B and the petitioner prays this Court issue a Writ of Certiorari.

Respectfully submitted,

FRANCIS J. LYNCH, II
STEPHEN M. A. WOODWORTH,
FRANCIS J. LYNCH, J.D., P.C.,
37 Belmont Street,
Brockton, Massachusetts 02401.
(617) 583-7268

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Appendix A

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 65217

LESLIE W. ABBOTT, Administratrix of	)
the Estate of James Abbott	)
and	)
RICHARD STAFFORD, Administrator of	)
the Estate of Casandra Chiminello	)
VS.	)
FEDERAL PACIFIC ELECTRIC COMPANY	)

COMPLAINT

Parties

1. The plaintiff, LESLIE W. ABBOTT is the administratrix of the Estate of James Abbott having received her appointment on March 3, 1983 at Suffolk Probate Court, No. 520494. The plaintiff resides at 139 L Street, City of South Boston, County of Suffolk, Commonwealth of Massachusetts.

2. The plaintiff, RICHARD STAFFORD is the administrator of the Estate of Casandra Chiminello having received his appointment on August 18, 1983 at Suffolk Probate Court, No. 520547. The plaintiff resides at 13 Mohawk Road, City of Holbrook, County of Norfolk, Commonwealth of Massachusetts.

3. The defendant, FEDERAL PACIFIC ELECTRIC COMPANY, is a New Jersey Corporation having a usual place of business at 150 Avenue L, Newark, NJ 07101.

General Allegations

4. The plaintiff intestates James Abbott and Casandra Chiminello on November 18, 1980 were residents at 120 Ironside Road, Charlestown, MA. Such residence being part of a housing project consisting of 262 units located at Old Landing Way and Old Ironside Way in Charlestown, MA.

5. On November 18, 1980 a fire occurred at 120 Ironside Way, Charlestown, MA as a result of which each of the plaintiff intestates endured smoke inhalation, thermal burns, suffered consciously, and died.

6. The plaintiff intestate James Abbott was survived by next of kin, his mother, the plaintiff Leslie W. Abbott.

7. The plaintiff intestate Casandra Chiminello was survived by next of kin, his mother Lynn Stafford.

8. Each of the plaintiff's deaths, pain and suffering was caused by a defective circuit breaker made and manufactured by the defendant Federal Pacific Electric Company.

COUNT I: LESLIE W. ABBOTT, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (death)

9. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count I.

10. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff intestate resided.

11. As a result thereof, the plaintiff intestate died.

12. This count is brought by the administratrix of the estate for the next of kin for compensation of loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, advice of the decedent.

COUNT II: LESLIE W. ABBOTT, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (pain and conscious suffering)

13. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count II.

14. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff intestate resided.

15. As a result thereof, the plaintiff intestate endured pain and conscious suffering.

COUNT III: LESLIE W. ABBOT, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty causing death)

16. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count III.

17. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was located in an apartment where the plaintiff intestate resided.

18. As a result thereof, the plaintiff intestate died.

19. This count is brought by the administratrix of the estate for the next of kin for compensation of loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, advice of the decedent.

COUNT IV: LESLIE W. ABBOTT, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty causing pain and conscious suffering)

20. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count IV.

21. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The

circuit breaker was located in an apartment where the plaintiff intestate resided.

22. As a result thereof, the plaintiff intestate endured pain and conscious suffering.

COUNT V: LESLIE W. ABBOTT, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (punitive damages)

23. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count V.

24. The defendant manufactured, distributed, failed to warn the plaintiff intestate of a defective circuit breaker. The defendant's conduct is in a manner which was reckless and grossly negligent.

25. As a result thereof, the plaintiff intestate died.

26. This action is brought by the administratrix of the next of kin in the amount of not less than five thousand ($5,000.00) dollars.

COUNT VI: RICHARD STAFFORD, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (death)

27. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count I.

28. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff intestate resided.

29. As a result, the plaintiff intestate died.

30. This count is brought by the administratrix of the estate for the next of kin for compensation of loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, advice of the decedent.

COUNT VII: RICHARD STAFFORD, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (pain and conscious suffering)

31. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count VII.

32. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff intestate resided.

33. As a result thereof, the plaintiff intestate endured pain and conscious suffering.

COUNT VIII: RICHARD STAFFORD, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty causing death)

34. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count VIII.

35. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was located in an apartment where the plaintiff intestate resided.

36. As a result thereof, the plaintiff intestate died.

37. This count is brought by the administrator of the estate for the next of kin for compensation of loss of reasonably expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, advice of the decedent.

COUNT IX: RICHARD STAFFORD, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty causing pain and conscious suffering)

38. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count IX.

39. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was located in an apartment where the plaintiff intestate resided.

40. As a result thereof, the plaintiff intestate endured pain and conscious suffering.

COUNT X: RICHARD STAFFORD, ADM. V. FEDERAL PACIFIC ELECTRIC COMPANY (punitive damages)

41. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count X.

42. The defendant manufactured, distributed, failed to warn the plaintiff intestate of a defective circuit breaker. The defendant's conduct is in a manner which was reckless and grossly negligent.

43. As a result thereof, the plaintiff intestate died.

44. This action is brought by the administrator of the next of kin in the amount of not less than five thousand ($5,000.00) dollars.

WHEREFORE, the plaintiffs demand the following:

1. On Count I one million ($1,000,000.00) dollars;
2. On Count II one million ($1,000,000.00) dollars;
3. On Count III one million ($1,000,000.00) dollars;
4. On Count IV one million ($1,000,000.00) dollars;
5. On Count V one million ($1,000,000.00) dollars;
6. On Count VI one million ($1,000,000.00) dollars;
7. On Count VII one million ($1,000,000.00) dollars;
8. On Count VIII one million ($1,000,000.00) dollars;
9. On Count IX one million ($1,000,000.00) dollars;
10. On Count X one million ($1,000,000.00) dollars;

11. Reasonable attorney's fees;
12. Interest.

By their attorney,
COSGROVE AND EISENBERG, P.C.

MARTIN S. COSGROVE
Post Office Box 198
Quincy, MA 02170
479-7770

Dated: November 18, 1983

PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES

Appendix B

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 65216

PATRICIA DIGHTON; GEORGE P. DIGHTON,)
PPA AND CHRISTOPHER DIGHTON, PPA.)
VS.)
FEDERAL PACIFIC ELECTRIC COMPANY)

COMPLAINT

Parties:

1. The plaintiff, PATRICIA DIGHTON, is a Massachusetts resident domiciled in Charlestown, Suffolk County, Commonwealth of Massachusetts.

2. The plaintiff, GEORGE F. DIGHTON, d/o/b 5/24/67, is a minor and resident of Charlestown, Suffolk County, Commonwealth of Massachusetts, who brings this action through his mother and next friend, Patricia Dighton.

3. The plaintiff, CHRISTOPHER DIGHTON, d/o/b 5/13/70, is a minor and resident of Charlestown, Suffolk County, Commonwealth of Massachusetts, who brings this action through his mother and next friend, Patricia Dighton.

4. The defendant, FEDERAL PACIFIC ELECTRIC COMPANY, is a New Jersey Corporation having a usual place of business at 150 Avenue L, Newark, NJ 07101.

General Allegations

5. The plaintiffs on November 18, 1980 were residents at 120 Ironside Road, Charlestown, MA. Such residence being

part of a housing project consisting of 262 units located at Old Landing Way and Old Ironside Way in Charlestown, MA.

6. On November 18, 1980 a fire occurred at 120 Ironside Way, Charlestown, MA as a result of which each of the plaintiffs endured smoke inhalation, thermal burns, suffered consciously and was obliged to expend monies for medical expenses.

7. Each of the plaintiff's pain and suffering was caused by a defective circuit breaker made and manufactured by the defendant Federal Pacific Electric Company.

COUNT I: PATRICIA DIGHTON V. FEDERAL PACIFIC ELECTRIC COMPANY (negligence)

8. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count II.

9. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff resided.

10. As a result thereof, the plaintiff endured pain and conscious suffering.

COUNT II: GEORGE DIGHTON, PPA V. FEDERAL PACIFIC ELECTRIC COMPANY (negligence)

11. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count II.

12. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff resided.

13. As a result thereof, the plaintiff endured pain and conscious suffering.

COUNT III: CHRISTOPHER DIGHTON, PPA V. FEDERAL PACIFIC ELECTRIC COMPANY (negligence)

14. The plaintiff realleges the description of the parties and the general allegations and makes them a part of this Count III.

15. The defendant Federal Pacific Electric Company negligently manufactured the circuit breaker which was located on the premises where the plaintiff resided.

16. As a result thereof, the plaintiff endured pain and conscious suffering.

COUNT IV: PATRICIA DIGHTON V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty)

17. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count IV.

18. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was loctated [*sic*] in an apartment where the plaintiff resided.

19. As a result thereof, the plaintiff endured pain and conscious suffering.

COUNT V: GEORGE DIGHTON PPA V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty)

20. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count V.

21. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was loctated [*sic*] in an apartment where the plaintiff resided.

22. As a result thereof, the plaintiff endured pain and conscious suffering.

COUNT VI: CHRISTOPHER, PPA V. FEDERAL PACIFIC ELECTRIC COMPANY (breach of warranty)

23. The plaintiff realleges the description of the parties and general allegations and makes them a part of this Count VI.

24. The defendant Federal Pacific Electric Company manufactured and put into the chain of commerce a circuit breaker which was defective at the time it was manufactured. The circuit breaker was loctated [*sic*] in an apartment where the plaintiff resided.

25. As a result thereof, the plaintiff endured pain and conscious suffering.

WHEREFORE, the plaintiffs demand the following:

1. On Count I five million ($5,000,000.00) dollars;
2. On Count II one million ($1,000,000.00) dollars;
3. On Count III one million ($1,000,000.00) dollars;
4. On Count IV five million ($5,000,000.00) dollars;
5. On Count V one million ($1,000,000.00) dollars;
6. On Count VI one million ($1,000,000.00) dollars;
7. Reasonable attorney's fees;
8. interest.

By their attorney,

CHARLES A. CLIFFORD
305 Main Street, Box 46
Charlestown, MA 02129
241-7440

Dated: November 18, 1983

PLAINTIFFS DEMAND TRIAL BY JURY ON ALL ISSUES.

Appendix C

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEDURES

RULE 64. REPORT OF CASE

The court, after verdict or after a finding of facts under Rule 52, may report the case for determination by the appeals court. If the trial court is of opinion that an interlocutory finding or order made by it so affects the merits of the controversy that the matter ought to be determined by the appeals court before any further proceedings in the trial court, it may report such matter, and may stay all further proceedings except such as are necessary to preserve the rights of the parties. The court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon. In an action commenced before a single justice of the supreme judicial court, the court may report the case in the circumstances above described to either the appeals court or the full supreme judicial court; provided further that a single justice of the supreme judicial court may at any time reserve any question of law for consideration by the full court, and shall report so much of the case as is necessary for understanding the question reserved.

District Courts and Municipal Court of Boston

PRESERVATION OF ISSUES AND APPEAL TO THE APPELLATE DIVISION

(a) Rulings on Evidence. When an objection is made to a ruling on the admission or exclusion of evidence, a request for a report shall be made at the time of the ruling and shall be reduced to writing and filed with the clerk within 5 days

after the hearing of all evidence. The written request for report shall clearly identify the question, answer (or offer of proof), or physical evidence and the related ruling which was the subject of the objection. The ruling thus identified in any such request for a report shall be included in any draft report filed after judgment pursuant to these rules. Objections to evidence shall be accompanied by a statement of the grounds therefor and shall be decided without argument unless the court calls upon the parties to make such argument.

(b) Requests for Rulings. Requests for rulings shall be in writing and be presented to the court before the beginning of any closing arguments unless special leave is given to present requests later. Whenever any request for rulings, founded upon evidence, shall be refused upon the ground that it is inconsistent with or inapplicable to the facts found, or because the facts recited in the request are not found, the court shall state the facts found, or the facts recited which it does not find, upon which such refusal is based, unless the same appear from special findings filed. No review as of right shall lie to the refusal of a request for a ruling "upon all the evidence" in a case admitting of specification of the grounds upon which such request is based unless such grounds are specified in the request, and then only upon the grounds so specified. Decisions of the trial justice as to all requests for rulings duly filed shall be in writing and shall be included in the report as allowed or established.

(c) Requests for Reports and Draft Reports

(1) *General Requirements and Time for Filing.*

(i) Requests for Reports. A request for report shall specify the party or parties making the request and shall designate each ruling which is the subject of the request. Such requests for reports shall be filed with the clerk of the trial court within 10 days after entry of judgment. Upon a showing of excusable neglect, the trial court may

extend the time for filing a request for report by any party for a period not to exceed 10 days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the original time period prescribed by this rule has expired; but if a request for an extension is made after such time has expired; it shall be made by motion with such notice as the court shall deem appropriate. Requests for reports shall be deemed included in draft reports filed within the period during which such requests for reports could have been filed.

(ii) Draft Reports. Parties requesting reports as provided for in (i) above shall file drafts thereof within 10 days after entry of judgment. Upon a showing of excusable neglect, the trial court may extend the time for filing draft reports by any party for a period not to exceed 10 days from the expiration of the time otherwise prescribed by this rule. Such an extension may be granted before or after the time otherwise prescribed by this rule has expired, but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate. The court may for good cause shown, upon the filing of a motion therefor within the time otherwise prescribed for the filing of the draft report, extend the time for filing the draft report for a reasonable time.

(iii) Effect of Certain Pending Motions. The running of the time for filing a request for report and for filing a draft report shall be terminated as to all parties by a timely motion filed with the clerk of the trial court by any party pursuant to the rules hereinafter enumerated in this sentence, and the full time for filing requests for reports and for filing draft reports as fixed by this rule shall commence to run and shall be computed from the entry of any of the

following orders made upon a timely motion under such rules: (1) granting or denying a motion under Rule 52(b) to amend or make additions findings of fact, whether or not an alteration of the judgment would be required if the motion be granted; (2) granting or denying a motion under Rule 59 to alter or amend the judgment; (3) denying a motion for a new trial under Rule 59.

(2) *Contents of the Draft Report*. The draft report shall state the issues raised by the pleadings, shall set forth in clear and concise terms the rulings upon which the party seeking the report has requested and now asks for a review by the appellate division, the state of the case at which and the manner in which the same arose, how he claims to be prejudiced by such rulings and any other facts essential to a full understanding of the questions presented. A written decision or finding and any special findings of facts by the trial justice shall be included in all draft reports, and copies of the complaint or any pleading necessary for the understanding or decision of the questions involved shall be annexed to or incorporated in the draft report. Papers on file in the case may not be incorporated by reference except by permission of the appellate division. Such draft report shall generally, as fully as may be, follow the model printed as Form 33 at the end of these rules.

(3) *Furnishing Copies*. A copy of such draft report shall forthwith be delivered or mailed postage prepaid by the party requesting the report to the trial justice addressed to him at the court where the case was heard, and to the adverse party or parties, before the close of the next business day after such filing. Compliance with this rule shall not be adversely affected nor impaired by the order or sequence of filing, delivering or mailing said draft report and copies thereof, nor by the order or sequence of receipt of the same.

(4) *Hearings; Allowance or Disallowance of Draft Reports*. Any party may, within 15 days after the filing of a draft report,

file a request in writing for a hearing thereon. Such a hearing shall be held in any event unless the court intends to allow the draft report as submitted. The justice shall, with reasonable dispatch, and after a hearing, if one has been held, either settle the form of his report or disallow the request for a report. He may order the party requesting the report to prepare a copy of the same as settled in form similar to said draft model and submit the same to him for formal allowance within such time as he may fix, and failure to comply with this order shall be sufficient ground for disallowing the request for a report. Upon receipt of a report as settled by him, the justice shall sign it. The clerk shall forthwith notify the parties of the court's action and upon the allowance, or the establishment, of any report as hereinafter provided, shall enter the cause upon the list of causes to be heard by the appellate division. The justice may amend his report after notice and hearing at any time prior to the hearing upon the merits thereof by the appellate division and said division may at any time re-commit the same for amplification, correction or other amendment.

(5) *Proceedings*. Until the report is allowed, or if disallowed, until a petition to establish the report is filed as hereinafter provided, all motions and other interlocutory matters shall be heard by the trial justice. After the report is allowed, or if the request for a report is disallowed, after a petition to establish the report is filed as hereinafter provided, all motions shall be filed with the clerk of the trial court and by him forthwith forwarded to the presiding justice of the appellate division. If the trial justice disallows the request for the report he shall set forth in writing succinctly the facts and reasons for such disallowance. If final action by the trial judge upon any draft report, other than upon an interlocutory matter, is not taken within three months after the filing thereof, and no petition for establishment of a report has been filed, the cause shall proceed as though no request for report had been made, unless

the appellate division for cause shown shall allow further time. Notice under this rule shall be sent by the clerk to the parties in the case fourteen days at least before the three months or extended period expires.

(6) *Dismissal of Draft Reports.* If the party requesting the report has failed to comply with the statutes or any of these rules applicable to draft reports, the justice may dismis it, in which case an aggrieved party who desires to raise the question of the correctness of the said order of dismissal may file a request for report and draft report on said dismissal and proceed as provided in these rules.

(d) Reports of Interlocutory Rulings. Interlocutory rulings may be reported in accordance with the procedure prescribed above in paragraph (c), provided that if the court in its discretion deems it appropriate, such rulings shall be reported without delay to the appellate division. When the court so decides to report such an interlocutory ruling without delay, it may order that the party requesting the report prepare and file a draft report thereof within a period specified by the court. Failure of a party to comply with such an order shall constitute a waiver of his right to request a report on the ruling at issue.

If no party has requested a report on an interlocutory ruling, the court on its own initiative may report the ruling to the appellate division.

(e) Establishment of Reports. Whenever a draft report shall be disallowed by a justice as not conformable to the facts, or shall be disallowed for any other cause, or if action on such report is unduly delayed, the party seeking the same may within 5 days after notice of such disallowance or such time as the appellate division may allow in any other case, file with the clerk his petition, including a copy of the draft report so disallowed, and five copies thereof verified by affidavit of the party or his attorney setting forth in full his request for such report and all of the facts material thereto and shall forthwith

give notice to the adverse party by delivering or mailing postage prepaid to him or his attorney of record a copy of such petition and affidavit. No party shall be allowed to establish the truth of any such allegations if he has failed to comply with the requirements herein prescribed. The five copies shall be forwarded forthwith to the presiding justice of the appellate division who may refer the matter for hearing and disposition to any justice of said division and if not so referred the same shall be in order to be heard by the appellate division. If said petition is allowed and the report established, the same, as allowed and established, shall be returned to the clerk of the court from which the petition and affidavit were sent. Notice of its receipt shall be given by him to all of the parties and the cause shall proceed as if the report had been allowed by the trial justice. The justice of the appellate division to whom may be assigned such a petition and affidavit for hearing and disposition, or the justices of the appellate division if said petition shall be heard by them, shall have the right and authority to summon and hear the parties and witnesses and to establish the report according to his or their findings of the facts or issue between the parties as to the form and content of the report. If the petition is denied either by the justice or the appellate division, it shall with the endorsement thereon of such denial be returned to the clerk of the originating court who shall notify all the parties and the case shall be disposed of as if no request for report had been made. Requests which relate to matters of law which might have been presented at the hearing on the merits and made the subjects of a report in the event of adverse rulings may not be raised as of right in connection with a petition to establish a report.

(f) Appellate Division Procedure. After notice of the allowance or establishment of a report, 15 days, exclusive of Sundays and holidays, shall be allowed the parties for filing briefs unless upon good cause shown further time is allowed by the

appellate division. The party seeking the report shall also file within said 15 days five additional copies of the report as allowed or established. There shall be filed with the clerk five copies of each brief, together with one additional copy for each adverse party. The clerk shall upon the expiration of said 15 days forthwith forward said reports and briefs to the presiding justice of his appellate division except those filed for the adverse party, together with five copies of the docket entries in said cause. The cause shall then be in order for argument in the appellate division at the time and place of its sitting as the presiding justice may direct. If any party be absent or not ready for argument when reached, said division may dispose of the cause as justice may require. Each party will be allowed one-half hour for argument unless said division shall extend the time. The party who requested the report shall have the right to open and close. Supplemental briefs may be filed with the appellate division by its consent or at its request. No oral argument will be heard in behalf of a party for whom briefs have not been filed as provided in this rule unless by special permission of the appellate division. The appellate division need not pass upon questions or issues not argued in briefs. Nothing argued in a brief shall be deemed to be waived by a failure to argue orally.

The draft report and all papers intended for use before the appellate division shall, unless the appellate division shall otherwise order, be printed or typewritten upon opaque paper having a dull surface. The typewriting or printing shall be double-spaced except for indented quotations which may be single-spaced and only one side of each page shall be written upon. The paper shall be 8½ inches in width and 11 inches in height. Briefs shall be signed by counsel, or by the party, and shall contain the points and authorities upon which the party relies, and his arguments upon them. When the construction or effect of a constitutional provision, statute, rule of

court, administrative regulation, or municipal ordinance or by-law is drawn in question, its text, so far as material, shall be set forth. Facts or evidence relied on shall be referred to by the page of the report. Briefs not in substantial compliance with this rule shall not be received unless the presiding justice shall otherwise order.

(g) Unnecessary Delay. If a party whose request for a report has been allowed or established shall not prosecute the same promptly by preparing the necessary papers or otherwise as herein provided, the appellate division may upon motion or of its own initiative order the cause to proceed as though no such claim had been made, and may impose double costs or take such action as justice may require. Any such motion shall be filed with the clerk of the originating court and by him promptly forwarded to the presiding justice of the appellate division.

(h) Appellate Division Sittings. The appellate division of the District Courts shall sit at such times and places within each district as the presiding justice of that district may direct. The appellate division of the Boston Municipal Court shall sit at such times as the Chief Justice of that court may direct. At the beginning of each such sitting the list of all cases to be heard at such sitting shall be called. All motions to be heard by the appellate division shall be in conformity to the rules and filed with the clerk of the court in which the case is pending not less than 5 days prior to the sitting of said appellate division at which said motion is to be presented, and forwarded forthwith by the clerk to the presiding justice. The finding or order upon motions or other interlocutory matters may be signed by the presiding justice or any justice of the appellate division.

(i) Decisions of the Appellate Division. If the appellate division shall decide that there has been no prejudicial error in the rulings complained of, it shall dismiss the report and may impose double costs in the action if it finds the objection

to such rulings frivolous or intended for delay. If the appellate division shall decide that there has been prejudicial error in the rulings complained of, it may reverse, vacate or modify the same, or order a new trial in whole or in part. The decision of the appellate division shall be signed by the justices making the same and filed in the clerk's office in which the cause originated, and notice thereof given by the clerk to the parties.

(j) Further Appellate Review. The Massachusetts Rules of Appellate Procedure govern appeals from decisions of the appellate division of the District Courts.

Amended June 19, 1975, effective July 1, 1975.

Appendix D

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, April 21, **1987.**

In The Case No. SJC-4247

PATRICIA DIGHTON & others

vs.

FEDERAL PACIFIC ELECTRIC COMPANY: SERT, JACKSON & ASSOCIATES INCORPORATED & others, third-party defendants (and a companion case)

pending in the Superior Court Department of the Trial **Court for the County of** Suffolk **No.** 65216; 65217

Ordered, that the following entry be made in the docket; vix.,—

The judgments of dismissal are affirmed.

By The Court,

/s/ Jean M. Kennett , Clerk.

April 21, 1987

See opinion on file.

PATRICIA DIGHTON & others[1] *vs.* FEDERAL PACIFIC ELECTRIC COMPANY; SERT, JACKSON & ASSOCIATES, INCORPORATED & others[2], third-party defendants (and a companion case[3]).

Suffolk. January 8, 1987. — April 21, 1987.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS & NOLAN, JJ.

Joint Tortfeasors. Contribution. Negligence, Statute of repose, Supplier. *Statute*, Construction. *Constitutional Law*, Equal protection of laws. *Uniform Commercial Code*, Sale of goods. *Words*, "Improvement to real property."

In tort actions with respect to a circuit breaker panel manufactured by the defendant and located in a building which was destroyed by fire, the judge did not err in dismissing the defendant's third-party complaint seeking contribution from the building's architect, against whom the plaintiffs' claims were barred by G. L. c. 260, § 2B, a statute of repose limiting the time within which an action in tort against the architect might have been brought. [691-692]

Application of G. L. c. 260, § 2B, a statute of repose, to bar a defendant in certain tort actions from seeking contribution did not abridge its right to a remedy by recourse to laws, as guaranteed by art. 11 of the Massachusetts Declaration of Rights, absent a claim by the defendant that § 2B operated to deny it any fundamental right, or any right against a third-party defendant that vested prior to the enactment of § 2B. [692-693]

This court declined to reconsider its holding in *Klein* v. *Catalano*, 386 Mass. 701 (1982), that G. L. c. 260, § 2B, which places a time limit on the tort liability of architects and others involved in the design, planning, construction, or administration of improvements to real property, does not violate the equal protection guarantee of the Fourteenth Amendment to the Federal Constitution for its failure to protect suppliers, whose situations are similar to those of the protected entities. [693]

[1] George P. Dighton and Christopher Dighton.

[2] General Electric Company; Kaiser Aluminum and Chemical Corp.; Leviton Manufacturing Co., Inc.; and Arvin Industries, Inc.

[3] Leslie W. Abbott, administratrix of the estate of James Abbott, and Richard Stafford, administrator of the estate of Casandra Chiminello *vs.* Federal Pacific Electric Company; Sert, Jackson & Associates, Incorporated & others, third-party defendants.

A manufacturer who supplied a construction component that became an integral part of a building, but who did not render any particularized services with respect to the design or construction of the building, was not one of the class of entities involved in the "design, planning, construction or general administration of an improvement to real property" within the meaning of G. L. c. 260, § 2B, a statute of repose which places a time limit on the tort liability of architects and building contractors. [694-696]

The acts of designing, manufacturing, and supplying a circuit breaker panel that became an integral part of a building did not constitute the "design, planning, construction or general administration of an *improvement* to real property" (emphasis supplied) within the meaning of G. L. c. 260, § 2B, a statute of repose which places a time limit on the tort liability of architects and building contractors. [696-698]

The limits of tort liability of a manufacturer who supplied a construction component that became an integral part of a building which later was destroyed by fire were governed by provisions of the Uniform Commercial Code, rather than by G. L. c. 260, § 2B, a statute of repose which places a time limit on the tort liability of architects and building contractors. [698-699]

CIVIL ACTIONS commenced in the Superior Court Department on November 18, 1983.

After the cases were consolidated for trial, motions to dismiss were heard by *John J. Irwin, Jr.*, J., and questions of law were reported by him to the Appeals Court. The Supreme Judicial Court granted a request for direct review.

Stephen M. A. Woodworth for Federal Pacific Electric Company.

Carol A. Griffin for Sert, Jackson and Associates, Inc.

Cornelius J. Moynihan, Jr. (*Patricia A. McEvoy* with him) for Kaiser Aluminum & Chemical Corporation.

Martin S. Cosgrove for the plaintiff.

LIACOS, J. The defendant and third-party plaintiff, Federal Pacific Electric Company (Federal Pacific), asks us to reconsider whether a manufacturer is protected by the so-called "statute of repose," G. L. c. 260, § 2B[4] (hereafter § 2B);

[4] General Laws c. 260, § 2B, inserted by St. 1968, c. 612, and amended by St. 1973, c. 777, § 2, reads as follows:

and, if not, whether the statute is unconstitutional because it is violative of the Fourteenth Amendment to the Constitution of the United States or art. 11 of the Constitution of the Commonwealth.

These questions come to us on a scanty record, comprised largely of the pleadings. Nonetheless, the following facts are not disputed. On November 18, 1980, fire ravaged an apartment at 120 Ironside Way in Charlestown, the residence of Patricia Dighton and her family. As a result of that fire, death came to Dighton's foster children, James Abbott and Casandra Chiminello. Dighton and her two sons were injured as well.

Three years later, Dighton and her sons brought suit in Suffolk Superior Court against Federal Pacific, alleging negligence and breach of warranty with respect to a circuit breaker manufactured by the defendant and "located on the premises" where the fire occurred. On the same date, a similar action for wrongful death was brought against Federal Pacific by Leslie W. Abbott and Richard Stafford, acting in their respective capacities as administrators of the estates of James Abbott and Casandra Chiminello. On a motion by Federal Pacific, these actions were consolidated.

In 1985, the judge permitted Federal Pacific to implead several third-party defendants as to both actions. Among these was the architectural firm which had designed the building, Sert, Jackson & Associates, Incorporated (Sert Jackson).[5] In

> "Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration."

The statute was further amended through St. 1984, c. 484, § 53, in ways not material to this case. No party disputes that the plaintiffs brought their actions "within three years next after the cause of action accrue[d]." At issue is the protective scope of the proviso which precludes recovery where actions are "commenced more than six years after the performance or furnishing" of designated services.

[5] See note 2 *supra*. Kaiser Aluminum and Chemical Corp. has submitted a brief.

1986, the judge granted Sert Jackson's motion to dismiss Federal Pacific's third-party complaint because Sert Jackson could be liable for contribution only if it could be directly liable to the plaintiffs, see *Liberty Mut. Ins. Co.* v. *Westerlind*, 374 Mass. 524 (1978), and because any direct claims by the plaintiffs against Sert Jackson were barred by § 2B. Separate and final judgment was entered for Sert Jackson, and Federal Pacific appealed.

At the time he granted Sert Jackson's motion, the judge also denied a motion by Federal Pacific under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), to dismiss the plaintiffs' claims. Federal Pacific claimed the protection of § 2B, arguing that, as one similarly situated to architects, it was entitled to the same statutory protection under G. L. c. 260, § 2B, as Sert Jackson. Federal Pacific had conceded in its memorandum, however, that its status was solely that of "a supplier and a manufacturer of a construction component"; the judge noted as well that the defendant did not claim to have rendered any "construction services." Relying on what was said about the intended scope of § 2B in *Klein* v. *Catalano*, 386 Mass. 701 (1982), the judge ruled that Federal Pacific, "as a supplier, does not fall within the statutory class envisioned by the legislature." Relying on what was said in *Milligan* v. *Tibbetts Eng'g Corp.*, 391 Mass. 364 (1984), the judge held that Federal Pacific's circuit breaker panel "did not constitute [an] . . . improvement to real property" under § 2B because it was neither "permanent" nor "intimately connected with the real property." The judge then exercised his discretion pursuant to Mass. R. Civ. P. 64, 365 Mass. 831 (1974), and reported to the Appeals Court the following questions of law: "1. Under G. L. c. 260 § 2B is a manufacturer who supplies a construction component that becomes an integral part of structure within the class of entities involved in 'the design, planning, construction or general administration of an improvement to real property.'? 2. Do the acts of designing, manufacturing and supplying a circuit breaker panel that subsequently becomes an integral part of a structure constitute an 'improvement to real property' within the meaning of G. L. c. 260 § 2B?" The Appeals

Court granted a motion by Federal Pacific to consolidate the judge's reports and its appeals of his orders dismissing the third-party actions against Sert Jackson. We granted Federal Pacific's application for direct appellate review.

Federal Pacific advances several arguments in support of its contention that the judge erred by dismissing its third-party complaint against Sert Jackson. It also argues, with respect to the court's denial of its own motion to dismiss, that we should adopt one of two alternative positions: (a) that the judge should have construed § 2B to include Federal Pacific within its protective ambit; or (b) that the judge construed § 2B correctly, but that such a construction renders § 2B unconstitutional under the Fourteenth Amendment, with the result that the judge's order dismissing Federal Pacific's claims against Sert Jackson must be reversed.

We hold that dismissal was properly ordered as to Sert Jackson. We further hold that the judge properly denied Federal Pacific's motion to dismiss. We answer both of the reported questions in the negative.

1. *Dismissal of the third-party complaint.* Federal Pacific argues that § 2B does not apply to its third-party action for contribution because § 2B, by its terms, only bars any "[a]ctions of tort." Contribution is available, however, only "where two or more persons become jointly liable *in tort*" (emphasis supplied). G. L. c. 231B, § 1 (*a*), inserted by St. 1962, c. 730, § 1. The right to contribution is derivative of the joint liability in tort of the third-party plaintiff and the third-party defendant. See generally *O'Mara* v. *H.P. Hood & Sons*, 359 Mass. 235, 238 (1971), and cases cited. See also *Liberty Mut. Ins. Co.* v. *Westerlind, supra*. Without liability in tort, there is no right to contribution.[6] *James Ferrera & Sons* v. *Samuels*, 21 Mass. App. Ct. 170, 174 (1985).

[6]The plaintiffs allege that Federal Pacific was not only negligent in the manufacture of its product but also in breach of warranty. However, any claim for breach of warranty pursuant to G. L. c. 106, § 2-314 (1984 ed.), states a cause of action which sounds, like negligence, in tort and not in contract. *Wolfe* v. *Ford Motor Co.*, 386 Mass. 95, 98 (1982). *Back* v. *Wickes Corp.*, 375 Mass. 633, 640 (1978).

Federal Pacific claims, in addition, that since "'misuse' of a product by an architect" is alleged in the third-party complaint, it is not barred by the language of § 2B. "Misuse," however, is clearly encompassed within the statutory reference to "*any deficiency* or neglect in the design, planning, construction or general administration of an improvement to real property" (emphasis supplied). G. L. c. 260, § 2B.

Federal Pacific cites, as authority for its contention, our statement that "[a]n action for contribution is not barred if, *at the time the tortious activity occurred*, the party from whom contribution is sought could have been held liable in tort" (emphasis in original). *McGrath* v. *Stanley*, 397 Mass. 775, 781 (1986). *McGrath* is inapposite. In that decision, we considered the effect on the third-party plaintiffs' rights to contribution from a public entity where primary plaintiffs were barred from suing the public entity directly, due to the plaintiffs' failure to make timely presentment as required by the Massachusetts Tort Claims Act, G. L. c. 258, § 4 (1984 ed.). In those circumstances, we held that c. 258 did not require dismissal of the third-party complaint because, by its explicit language, "[t]he Legislature simply created an exemption from the notice provisions of § 4 for all third-party claims regardless of whether presentment had been made by the party originating the action." *McGrath, supra* at 780.[7] No analogous exemption appears in § 2B to suggest a legislative intent to permit third-party actions that would otherwise be prohibited by § 2B.

Federal Pacific also maintains that, because its liability may result solely from the architect's negligence, denial of the right to seek contribution is violative of art. 11 of the Massachusetts Declaration of Rights. What was said of the plaintiff in *Klein* v. *Catalano*, 386 Mass. 701 (1982), may be said of Federal Pacific as third-party plaintiff here: "We agree . . . that G. L. c. 260, § 2B, does abolish [the] cause of action against [Sert Jackson] without providing an alternative remedy." *Id.* at 711.

[7] The relevant language of exemption in G. L. c. 258, § 4, is: "The provisions of this section shall not apply to such claims as may be asserted by third-party complaint, cross-claim or counterclaim."

But while art. 11 guarantees the right to "a certain remedy, by having recourse to the laws, for all injuries or wrongs," Federal Pacific does not claim that § 2B operates to deny it any fundamental right, nor any right against Sert Jackson that vested prior to the enactment of § 2B. In these circumstances, there is no escape from our prior holding that application of § 2B does not violate art. 11. *Id.* at 711-713.[8]

The judge did not err in ruling that § 2B applied to Sert Jackson's motion for dismissal.

2. *Construction and constitutionality of § 2B.* While Federal Pacific acknowledges that we recently have held to the contrary, see *Klein, supra*, it urges us either to construe § 2B as including it within the class of protected defendants, or to declare that the statute violates the equal protection guarantees of the Fourteenth Amendment for its failure to protect suppliers whose situations are similar to those of protected architects, construction engineers, and contractors. For the reasons stated in our *Klein* decision, we continue to hold that § 2B is constitutional even if construed to exclude "suppliers, owners, tenants, and others in possession or control" but not "architects, engineers, contractors and others involved in the design, planning, construction, or general administration of improvements to real property." *Klein, supra* at 715, 717.[9]

[8] Federal Pacific also claims that the judge erred in permitting Sert Jackson to benefit from § 2B because "it is unclear if c. 260 Section 2B is even, generally, founded upon a valid state or public interest as the statute may encourage a builder or architect to perform in a less than workmanlike manner, secure in the knowledge that he will be immune from liability after the passage of six years." Were we inclined to read between the lines of this cryptic comment, we might infer a challenge to the validity of § 2B under the due process clause of the Fourteenth Amendment. Because this question is inadequately argued in Federal Pacific's brief, we will not address it. Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975). We note, however, that we have held that § 2B does not violate Federal guarantees to due process. *Klein, supra* at 707-711.

[9] The equal protection arguments raised by Federal Pacific were fully aired and answered in *Klein*. Federal Pacific merely lists a number of bases upon which we held that the Legislature might conceivably have made a rational choice to protect a limited class of defendants; then it asserts that, because those particular bases apply equally to it, its situation is wholly

We consider the questions reported. The judge has framed the single question, whether Federal Pacific is entitled to the protection of § 2B, in bipartite form, asking first whether Federal Pacific, as a supplier of construction components, is an *actor* comprehended by § 2B, and then asking whether its *acts* — designing, manufacturing, and supplying a circuit breaker panel — are comprehended within the statutory reference to "design, planning, construction or general administration of an improvement to real property."

On its face, § 2B defines the protected actor largely by reference to protected acts. The body of § 2B names no class of protected actors. Rather, its terms extend protection to persons allegedly responsible for acts, i.e., those who commit "any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property."

"Our task is to interpret the statute 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.' *Industrial Fin. Corp.* v. *State Tax Comm'n*, 367 Mass. 360, 364 (1975), quoting *Hanlon* v. *Rollins*, 286 Mass. 444, 447 (1934)." *O'Brien* v. *Director of the Div. of Employment Sec.*, 393 Mass. 482, 487-488 (1984).[10]

indistinguishable from that of protected defendants. Federal Pacific ignores those bases alluded to in *Klein* which do not apply to it, e.g., the difficulties arising where "[a]rchitectural plans may have been discarded, [or] copies of building codes in force at the time of construction may no longer be in existence. . . ." *Klein, supra* at 709-710. And it ignores the distinction drawn in *Klein* between the situations of builders and suppliers "because they work under dissimilar conditions." *Id.* at 716. We see no reason to reconsider our holding on the constitutional question determined by *Klein*.

[10] The legislative history of § 2B is replete with references to classes of actors, such as architects, engineers, contractors, and surveyors. See 1967 House Doc. No. 2603; 1967 House Doc. No. 4815; Report of the Legislative Research Council Relative to a Statute of Limitations for Malpractice Against Architects, Engineers and Surveyors, 1968 Senate Doc. No. 1050; 1968 Senate Doc. No. 339. None of these sources refers at all to problems of

On the same day we decided *Klein*, we remanded a similar case where "it [was] not clear whether [the defendants] were materialmen, whether they rendered architectural or engineering services for the construction of the building . . . or whether they furnished both supplies and engineering or architectural services." *King's Dep't Stores, Inc.* v. *Poley-Abrams Corp.*, 386 Mass. 1008, 1009 (1982). We indicated, "[t]o the extent that these defendants are materialmen, they are not within the protection of G. L. c. 260, § 2B." *Id.* Just as clearly, any conclusion that Federal Pacific was merely a materialman (and therefore a nonprotected actor) requires a finding that Federal Pacific had not performed protected acts, i.e., that Federal Pacific had not "rendered architectural or engineering services for the construction of the building." Conversely, when faced with cases in which the defendants were protected by § 2B, see *Anthoney's Pier Four, Inc.* v. *Crandall Dry Dock Eng'rs, Inc.*, 396 Mass. 818 (1986); *Milligan* v. *Tibbetts Eng'g Corp.*, 391 Mass. 364 (1984); *Raffel* v. *Perley*, 14 Mass. App. Ct. 242 (1982), the courts of this Commonwealth have focused their inquiry on whether the acts alleged to have caused injury were performed with respect to "improvement to real estate." See *Anthony's Pier Four, Inc.*, *supra* at 823 n.8; *Milligan*, *supra* at 366-368; *Raffel*, *supra* at 243-245.

Because "the inspection, supervision and observation of construction by architects and contractors involves *individual expertise* not susceptible of the quality control standards of the factory" (emphasis supplied), *Burmaster* v. *Gravity Drainage Dist. No. 2 of the Parish of St. Charles*, 366 So. 2d 1381,

repose encountered by manufacturers or suppliers of construction components, although the problems anticipated by architects and engineers were understood to result from the decline of the "privity" doctrine. See *Klein*, *supra* at 708 n.7 (1982); 1968 Senate Doc. No. 1050, at 16-17. However, the relevance of these sources is doubtful. "[W]here the language of the statute is plain and unambiguous, . . . legislative history is not ordinarily a proper source of construction." *Hoffman* v. *Howmedica, Inc.*, 373 Mass. 32, 37 (1977). It is clear from the language of the statute, and our decisions, that § 2B does not apply to materialmen and suppliers. Any ambiguity that may arise in the application of § 2B arises only from the question whether a party acted as a materialman or supplier or as an architect, engineer, contractor, or surveyor.

1386 (La. 1978), we think that the Legislature, by enacting § 2B, meant to protect providers of "individual expertise" in the business of designing, planning, constructing, and administering improvements to real estate. We reiterate that § 2B was intended not to apply to mere suppliers of standardized products, but only to the kinds of economic actors who perform acts of "individual expertise" akin to those commonly thought to be performed by architects and contractors — that is to say, to parties who render particularized services for the design and construction of particular improvements to particular pieces of real property.

Federal Pacific does not claim to have rendered any such particularized services with respect to design or construction of the building which burned. Thus, it clearly falls outside that class of economic actors which § 2B was intended to protect. In this regard, however, Federal Pacific argues that, because it designed, manufactured, and supplied a component which became affixed to real property, it was involved sufficiently in acts relating to an "improvement to real property" for us to hold that the Legislature intended it to benefit from the protection of § 2B. We disagree.

To begin, we note that "[t]he statute does not define 'improvement,' " *Raffel, supra* at 243, and "[t]he legislative history of G. L. c. 260, § 2B, does not indicate precisely what the Legislature meant the term to encompass." *Milligan, supra* at 366. Federal Pacific invites us to make the scope of § 2B dependent on the common law of "fixtures." But § 2B makes no reference to "fixtures," nor does it appear that the Legislature intended, by its choice of the common term "improvement," to subsume that tangle of highly technical meanings, often distinct in diverse legal contexts, which is the law of fixtures. We align ourselves with "[t]he overwhelming majority of courts [which] have eschewed a rigid fixture analysis . . . ." Heller, The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment, 34 Cath. U.L. Rev. 919, 932 (1985).[11]

[11] The plaintiffs argue that the test should be that which the judge applied, one which asks whether the product alleged to have caused harm was

Federal Pacific also argues that it should be protected by § 2B because, when incorporated into the building that was burned, its circuit breaker panel constituted an "improvement" within the definition of that term which appears in Webster's Third New Int'l Dictionary 1138 (1971).[12] Admittedly, we have said that it is not "out of place" to consider Webster's definition, *Milligan, supra* at 368. Accord *Raffel, supra* at 245. See also *Anthony's Pier Four, Inc., supra* at 823 n.8. In none of those cases, however, was the defendants' status as a protected actor in doubt. Where the actor is clearly within the statute, as an architect or a construction engineer, the use of a broad definition such as Webster's is apt to give full scope to the remedial purposes of § 2B when divining whether the allegedly tortious act is also within the statute. Here, however, we are urged to use that definition for a different purpose — to decide which actors were intended to be comprehended by § 2B. The utility of the definition is doubtful in this context.

For example, if a piece of metal sculpture were welded to an exposed girder in a building, it certainly could be characterized as "a permanent addition to or betterment of" the property, one "enhanc[ing] its capital value," one "involv[ing] the expenditure of labor or money," one "designed to make the property more . . . valuable," and one clearly "distinguish[able] from ordinary repairs." But would that tell us whether, or to what extent, the sculptor had been involved in the protected *activity* of "improvement to real property?" We

permanently affixed to real property. This distinction gives rise to problems of line-drawing analogous to those encountered with respect to fixture analysis. For example, a circuit breaker panel may be intended by the installer to be as "permanent" as a window or a shingle or a length of electrical wiring. However, like a window which breaks, or a shingle that wears out, or a wire that "shorts," a circuit breaker panel is replaceable if need be; and, in that sense, none of these can be called "permanent" in fact. Because we construe the scope of § 2B to turn on questions of fact not at issue here, we also reject the argument advanced by Kaiser Aluminum that summary judgment was granted prematurely in this case.

[12] Webster's defines "improvement" as: "[A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."

think not. If he produced the sculpture on commission by the developer to specifications provided in part by the architect and the engineer, we might conclude that he is protected by § 2B; but if he mass-produced the sculpture and sold it for use in a variety of contexts, or for incorporation into any building, we would conclude that he had been involved merely in the activity of producing and selling a fungible commodity, and not in the activity of improving real estate.

Thus, the fact that a producer's product may be usable by persons involved in protected acts tells us nothing about whether the producer's activity is protected, even though the product may fit within Webster's definition of an "improvement." That the use involves affixation to real property is likewise of no consequence, nor is the permanence of the fixation.

We are led by our analysis to agree with the plaintiffs, that Federal Pacific can best be described as a producer and seller of "goods,"[13] and the limits of its liability are governed by G. L. c. 106, § 2-318, not by § 2B. To be sure, the goods sold were usable in what became an improvement to real property, i.e., construction of the building, but the activity of designing, producing, and marketing those goods was no more involved in the protected activity of improving real property than would be Sert Jackson's activity of designing hammers, should the latter undertake to do so. Thus, we conclude that the Legislature intended tort actions arising from such activity to be governed by provisions of the Uniform Commercial Code[14] and not by § 2B.

This conclusion is further supported by our realization that, when § 2B was enacted in 1968, the liability of manufacturers and suppliers for injuries caused by the failures of their products was already encompassed to a certain extent within the General

[13] It is indisputable that, at the moment when Federal Pacific's circuit breaker panel was "identified" to its contract of sale for use in the subject building, that product was "movable" and thus an item of commercial "goods" within the meaning of the Uniform Commercial Code. See G. L. c. 106, § 2-105 (1) (1984 ed.).

[14] See note 6 *supra*.

Laws. See G. L. c. 106, §§ 2-314 and 2-318 (implied warranty of merchantability actionable in limited circumstances, absent privity of contract).[15] Actions based upon these laws were also governed by an existing statute of limitations. See G. L. c. 106, § 2-725 (1984 ed.). We assume, of course, that the Legislature was aware of these provisions of the Uniform Commercial Code when it enacted § 2B. See *Hadley* v. *Amherst*, 372 Mass. 46, 51 (1977). We are mindful, as well, that we cannot construe § 2B to have repealed, or superseded, these provisions, even in part, unless we find in § 2B "express words" or a "clear implication" to that effect. *Cohen* v. *Price*, 273 Mass. 303, 309 (1930). We find neither. Both reported questions are answered, "No," and the judgments of dismissal are affirmed.

So ordered.

[15] Section 2-318 of c. 106 was first amended in 1971 to abolish entirely the requirement of privity of contract. See St. 1971, c. 670, § 1. That amendment applies only to sales made on or after this effective date. *Id.* at § 2. We express no opinion as to whether the plaintiffs' actions for breach of warranty, if not barred by § 2B, may nonetheless be barred by the privity requirements stated in the original version of § 2-318. See St. 1957, c. 765, § 1.

Supreme Court, U.S.
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No. 87-403

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL PACIFIC ELECTRIC COMPANY, INC.,
PETITIONER,

v.

PATRICIA DIGHTON, GEORGE P. DIGHTON, PPA, CHRISTOPHER DIGHTON, PPA, LESLIE ABBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES ABBOTT, RICHARD STAFFORD, ADMINISTRATOR OF THE ESTATE OF CASANDRA CHIMINELLO, GENERAL ELECTRIC COMPANY, KAISER ALUMINUM AND CHEMICAL CORP., LEVITON MANUFACTURING CO., INC., SERT, JACKSON & ASSOCIATES, INC., GEORGIA PACIFIC CORP. AND ARVIN INDUSTRIES, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF RESPONDENT SERT, JACKSON & ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Does M.G.L. c. 260, §2B, a statute of repose for claims against architects and design professionals, satisfy the requirements of the equal protection clause of the United States Constitution?

RULE 28.1 STATEMENT

Respondent Sert, Jackson and Associates, Inc. has no parent corporations, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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In the
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OCTOBER TERM, 1987

No. 87-403

FEDERAL PACIFIC ELECTRIC COMPANY, INC.,
PETITIONER,

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PATRICIA DIGHTON, GEORGE P. DIGHTON, PPA, CHRISTOPHER DIGHTON, PPA, LESLIE ABBOTT, ADMINISTRATRIX OF THE ESTATE OF JAMES ABBOTT, RICHARD STAFFORD, ADMINISTRATOR OF THE ESTATE OF CASANDRA CHIMINELLO, GENERAL ELECTRIC COMPANY, KAISER ALUMINUM AND CHEMICAL CORP., LEVITON MANUFACTURING CO., INC., SERT, JACKSON & ASSOCIATES, INC., GEORGIA PACIFIC CORP. AND ARVIN INDUSTRIES, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF RESPONDENT SERT, JACKSON & ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent Sert, Jackson and Associates, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Massachusetts Supreme Judicial Court's opinion in this case.

Opinion Below

The opinion of the Massachusetts Supreme Judicial Court in this case is reported at 399 Mass. 687, 506 N.E.2d 509 (1987) and is reproduced in the appendix attached to the petition for writ of certiorari at pp. 23a to 35a.

Statute Involved

Massachusetts General Laws c. 260, §2B, inserted by St. 1968, c. 612 and amended by St. 1973, c. 777, §2, provides as follows:[1]

> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the performance or furnishing of such design, planning, construction or general administration.

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[1] Subsequent to a 1984 amendment, M.G.L. c. 260, §2B provides as follows:

> Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, other than that of a public agency as defined in section thirty-nine A of chapter seven shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.
>
> Actions of tort for damages arising out of any deficiency or neglect in the design, planning, construction, or general administration of an improvement to real property of a public agency, as defined in said section thirty-nine A shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall actions be commenced more than six years after the earlier of the dates of: (1) official acceptance of the project by the public agency; (2) the opening of the real property to public use; (3) the acceptance by the

Counterstatement of the Case

The Respondent, Sert, Jackson and Associates, Inc. ("Sert Jackson"), submits the following Counterstatement to add relevant facts omitted from the petitioner's Statement and to correct certain inaccuracies.

In its Statement of the Case, the petitioner, Federal Pacific Electric Company ("Federal Pacific"), correctly states that this case arose out of three consolidated actions in Suffolk Superior Court (Civil Action Nos. 58322, 65216, and 65217). In Civil Action Nos. 65216 and 65217, Federal Pacific was the named defendant, and it impleaded, *inter alia*, Sert Jackson as a third party defendant.

In the third related action, Patricia Dighton ("Ms. Dighton"), a plaintiff in one of the two actions against Federal Pacific, commenced an action against her landlord, the general contractor which built her apartment building, the contractor's surety, and Sert Jackson as architect (Suffolk Superior Court Civil Action No. 58322). Sert Jackson was never served in this action, and all defendants, except Sert Jackson, settled this action.

In conjunction with its motion to dismiss the third-party complaints against it in Suffolk Superior Court Civil Action Nos. 65216 and 65217, Sert Jackson also filed a motion to dismiss in C.A. No. 58322, alleging several grounds. Suffolk Superior Court allowed the motion to dismiss in C.A. No. 58322 on the grounds that the claim was barred by M.G.L. c. 260, §2B, and Ms. Dighton did not appeal from the dismissal of this action.

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contractor of a final estimate prepared by the public agency pursuant to chapter thirty, section thirty-nine G; or (4) substantial completion of the work and the taking possession for occupancy by the awarding authority.

The parties and the trial court relied on the post-1984 statute, while the Supreme Judicial Court appears to have utilized the pre-1984 statute. 399 Mass. at 688 n.4, 437 N.E.2d at 511 n.4. However, the Massachusetts Supreme Judicial Court also found that the differences between the two statutes were immaterial for the purposes of this case. *Id.*

The basis of the third-party complaint by Federal Pacific against Sert Jackson was that as an architect for the premises at issue, Sert Jackson had designed the premises and its structural and electrical components and that Sert Jackson's alleged negligence and breach of express or implied warranties in such design and construction proximately caused the plaintiffs' injuries. The record at the time of the allowance of Sert Jackson's motion to dismiss, and consequently the record on appeal, contained neither the allegation nor proof that Sert Jackson approved the use of aluminum rather than copper wire or that the failure to use copper wire or, in the alternative, that the use of aluminum wire, caused the fire.

Reasons Why the Petition Should Be Denied

I. The Massachusetts Supreme Judicial Court Correctly Held That M.G.L. c. 260, §2B Does Not Violate the Equal Protection Clause of the United States Constitution.

In its petition for a writ of certiorari, Federal Pacific argues that M.G.L. c. 260, §2B violates the equal protection clause of the United States Constitution because the statute improperly distinguishes between architects and materialmen or suppliers, even though the two groups are allegedly similarly situated, and that any distinction between the two groups is arbitrary and without a rational basis. However, the Massachusetts Supreme Judicial Court found that architects and suppliers are not similarly situated and that providing the protection of the statute to those involved in design and construction, but not to suppliers or materialmen, bears a rational relationship to a legitimate and permissible legislative objective. Consequently, the Massachusetts Supreme Judicial Court properly held that M.G.L. c. 260, §2B is constitutional, and there is no need for this Court to review that decision.

Equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312 (1976). Where a challenged provision neither adversely affects a fundamental right nor contains a classification based upon a suspect criterion, the provision is examined under the "rational basis" test, whereby the statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 195-196 (1983).[2]

In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, this Court will examine two questions: (1) whether the challenged legislation has a legitimate purpose, and (2) whether it was reasonable for the lawmaker to believe that use of the challenged classification would promote that purpose. *Western and Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 668 (1981). Legislatures are ordinarily presumed to have acted constitutionally, and state laws are entitled to a presumption of validity against attack under the equal protection clause. *Clements* v. *Fashing*, 457 U.S. 957, 962-963 (1982) and *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979). Furthermore, the classification will be upheld if the question as to whether the legislation furthers a legitimate state goal is at least debatable. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

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[2] On occasion, this Court has employed an intermediate standard to examine certain types of classifications, such as those based on gender or illegitimacy. *See, e.g., Craig* v. *Boren*, 429 U.S. 190 (1976) and *Mills* v. *Habluetzel*, 456 U.S. 91 (1982). Under this intermediate standard, the challenged classification must be substantially related to a legitimate state interest. *Mills* v. *Habluetzel*, 456 U.S. at 99.

A legislature may draw classifications "one step at a time", addressing problems in a piecemeal fashion, and a classification is not deficient simply because the state could have selected another means of achieving the desired end. *Clements* v. *Fashing*, *supra* at 969-970. Moreover, a court examining a classification under the equal protection clause should not substitute its judgment of good public policy for that of the legislature. *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981) and *Parham* v. *Hughes*, *supra* at 351.

The U.S. Supreme Court has utilized the rational basis test to examine the constitutionality of statutes regulating the duration of a defendant's liability. For example, in *G. D. Searle & Co.* v. *Cohn*, 455 U.S. 404 (1982), the U.S. Supreme Court examined a New Jersey statute which tolled the statute of limitations as against out-of-state corporations and, utilizing the rational basis test, found the statute constitutional.

In *G. D. Searle & Co.*, a New Jersey statute tolled the running of the statute of limitations against out-of-state corporations if the corporation had no resident agent on whom to make service. The trial court had found that the tolling provision operated to preserve only causes of action against corporate defendants that were not subject to *in personam* jurisdiction in New Jersey, and with the enactment of New Jersey's long arm rule, the rationale for the pre-existing tolling provision ceased to exist. Consequently, the trial court held that the tolling provision served no logical purpose and found it invalid under the equal protection clause.

The U.S. Supreme Court disagreed. Utilizing the rational basis test and relying on reasons supporting the statute articulated in a New Jersey case, the Court found that the statute satisfied this test because rational reasons supported tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey.[3]

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[3] Unrepresented foreign corporations remained difficult to locate, a problem which was not alleviated by long-arm jurisdiction, and the institution of long-arm jurisdiction in New Jersey did not make service on an unrepre-

See also, Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) (federal statute imposing limitation on liability for federally licensed private nuclear power plant was constitutional where its purpose was to encourage private participation in developing nuclear energy).

In examining economic legislation, this Court has generally upheld such legislation where the Court found that the legislation was rationally related to a legitimate state purpose. *See, e.g., Exxon Corp.* v. *Eagerton, supra* (state statute increasing tax on gas and oil, excepting royalty owners from increase, and prohibiting producers from passing on increase to purchasers was not unconstitutional because it was rationally related to goal of protecting consumers and encouraging investment).

Furthermore, the U.S. Supreme Court has also examined and upheld social welfare legislation under the rational basis test. *See, e.g., Bowen* v. *Gilliard*, __ U.S. __, 107 S.Ct. 3008 (1987) (requirement that family wishing to receive welfare benefits include within its family unit child for whom child support payments are being made by noncustodial parent does not violate equal protection principles); *Lehr* v. *Robertson*, 463 U.S. 248 (1983) (state's failure to give putative father of illegitimate child notice of pending adoption proceedings, despite knowledge of his whereabouts, did not deny putative father equal protection); *Clements* v. *Fashing, supra* (state constitutional provisions regulating circumstances in which judges and other state employees could run for public office did not violate equal protection clause).[4]

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sented foreign corporation the equivalent of service upon a corporation with a New Jersey representative. Therefore, there were additional burdens a plaintiff was required to bear when he sued a foreign corporation lacking a New Jersey representative which he was not required to bear if the defendant were a domestic corporation or a foreign corporation with a New Jersey representative. Consequently, because of these additional burdens on the plaintiff, the U.S. Supreme Court held that the tolling provision did not deprive an unrepresented foreign corporation of the equal protection of the laws. *See G. D. Searle & Co.* v. *Cohn*, 455 U.S. at 410-412.

[4] This Court has refused to apply a "heightened" standard of review, rather than the rational basis test, to social welfare legislation. *See, e.g., Bowen*

Finally, in those cases where this Court has invalidated state provisions under the rational basis test, it has done so because the challenged statute did not further any state interest or because there was no rational basis for the statute in the record. Thus, in *City of Cleburne, Texas* v. *Cleburne Living Center*, 473 U.S. 432 (1985), this Court found that a zoning ordinance which excluded group homes for the mentally retarded violated the equal protection clause where the record did not reveal *any* rational basis for the exclusion and where the challenged classification rested on irrational prejudice. *See also Plyler* v. *Doe*, 457 U.S. 202 (1982) (Texas statute which withheld from school districts state funds for education of children who were not "legally admitted" into United States and which authorized school districts to deny enrollment to such children denied such children equal protection because statute did not further any substantial state goal).

In the instant case, Sert Jackson contends that the Massachusetts Supreme Judicial Court properly found that the applicable standard of review was the rational basis test. Furthermore, Sert Jackson contends that the Court properly applied the rational basis test in determining that M.G.L. c. 260, §2B was constitutional because the Court identified several legitimate state goals and determined that the statute was rationally related to the achievement of those goals. Consequently, there is no need for this Court to review the decision.

In its decision in the instant case, the Massachusetts Supreme Judicial Court relied on its decision in *Klein* v. *Catalano*, 386 Mass. 701, 437 N.E.2d 514 (1982), in which it had held that M.G.L. c. 260, §2B did not violate the equal protection clause. *See Dighton* v. *Federal Pacific Electric Co.*,

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v. *Gilliard*, *supra* (no merit to argument that "heightened scrutiny" must be applied because amendment affects family's right to live in type of family unit it chooses) and *Clements* v. *Fashing*, *supra* (not all ballot access questions require "heightened" equal protection scrutiny).

399 Mass. at 693, 506 N.E.2d at 514. In *Klein* v. *Catalano*, *supra*, the Supreme Judicial Court examined a number of constitutional challenges to M.G.L. c. 260, §2B, including an equal protection challenge identical to that raised by Federal Pacific, and found the statute constitutional in all respects. With respect to the equal protection challenge, the Court found that the statute of repose was constitutional because it was rationally related to a legitimate state goal.

In *Klein*, the Supreme Judicial Court held that the statute of repose did not violate the equal protection clause, even though the protection of the statute was applicable to persons involved in design and construction, but not to suppliers or owners and tenants. Initially, the Court identified the legislative purpose behind the enactment of a statute of repose.

> General Laws c. 260, §2B was enacted in response to case law abolishing the rule that once an architect or builder had completed his work and it had been accepted by the owner, absent privity with the owner, there was no liability as a matter of law.... These cases greatly increased the liability of architects, contractors, and others involved in the construction industry. "The architect or contractor was confronted not only with an unlimited class of potential claimants, but also, in many instances, with an extension in duration of the liability for negligence."...An injury could occur many years after the architect or contractor had completed his work. Since an ordinary statute of limitations did not begin to run until either the date of the injury or its discovery, those involved in construction were subject to possible liability throughout their professional lives and into retirement. At the urging of those involved in the construction industry, the legislature placed an absolute outer limit on the duration of this liability.

386 Mass. at 708-709, 437 N.E.2d at 519-520 (footnote and citations omitted).

The Court also noted that limiting the duration of liability is a well-recognized public purpose and that "[t]here comes a time when a defendant ought to be secure in his reasonable expectation that the slate has been wiped clean and that he ought not to be called on to resist" a stale claim. 386 Mass. at 709, 437 N.E.2d at 520 (citations omitted).

After identifying the public purpose behind the statute of repose, the Court then examined whether the statute's classifications were reasonably related to its purpose and whether the statute created an unreasonable or arbitrary scheme which resulted in disparate treatment for similarly situated individuals. With regard to suppliers and materialmen, the Court held that it was permissible to provide the protection of the statute to architects but not suppliers.

> The Legislature could also have reasonably concluded that it is appropriate to place separate time limits on the liability of builders and suppliers, because they work under dissimilar conditions. "Suppliers and manufacturers who typically supply and produce components in large quantities, make standard goods and develop standard processes. They can thus maintain high quality control standards in the controlled environment of the factory. On the other hand, the architect or contractor can pretest and standardize construction designs and plans only in a limited fashion. In addition, the inspection, supervision, and observation of construction by architects and contractors involves individual expertise not susceptible to the quality control standards of the factory."

386 Mass. at 716, 437 N.E.2d at 524 (citations omitted).

The Supreme Judicial Court also noted that limiting the liability of architects and design professionals only was necessary to encourage these professionals to experiment with new designs and materials. Design creativity might be stifled if architects and engineers feared that untried configurations might lead to liability decades later. 386 Mass. at 717, 437 N.E.2d at 524.

Finally, with regard to owners and tenants, the Court found that there was a valid distinction between architects and persons in possession or control, such as owners or tenants. Once the architect or contractor completes construction and relinquishes control, the architect or contractor cannot guard against neglect, abuse, poor maintenance, mishandling, improper modification or unskilled repair of the improvement to real property which might give rise to liability. 386 Mass. at 715-716, 437 N.E.2d at 524. *See also Cournoyer* v. *Massachusetts Bay Transportation Authority*, 744 F.2d 208 (1st Cir. 1984) (upholding M.G.L. c. 260, §2B against challenge under equal protection clause).

In the instant case, plainly the appropriate standard of review is the rational basis test, rather than strict scrutiny or even a "heightened" scrutiny. *See, e.g., G. D. Searle & Co.* v. *Cohn*, *supra*. Indeed, in its petition, Federal Pacific does not contend that M.G.L. c. 260, §2B should be examined under a more stringent standard. Furthermore, in the *Klein* decision, which the Massachusetts court declined to reconsider in *Dighton*, the Massachusetts Supreme Judicial Court properly identified the legitimate state purposes supporting M.G.L. c. 260, §2B and also properly found that the statute was rationally related to the achievement of these goals.

In its petition, Federal Pacific contends that denying it the protection of M.G.L c. 260, §2B constitutes an equal protection violation because Federal Pacific, as a supplier, faces a potentially unlimited period of liability and because Federal Pacific has no right to enter, inspect or otherwise control the improvement to real property in order to guard against neglect, poor maintenance or improper use of Federal Pacific's product. (Petition, pp. 8-12) While these reasons might be sufficient grounds to persuade the legislature to extend the protection of the statute to suppliers, they are not sufficient to justify a finding that the distinction between architects and suppliers is so arbitrary as to constitute a violation of equal protection.

More importantly, Federal Pacific completely fails to address the reasons articulated in *Klein* and other cases, and adopted in *Dighton*, for distinguishing between architects and suppliers. Manufacturers and suppliers who produce components in large quantities make standardized goods. They can pretest their products and maintain high quality control standards in the controlled environment of the factory. Architects, however, can pretest and standardize construction designs in only a limited fashion. In addition, services performed by architects require individual expertise not susceptible to quality control standards of the factory. Moreover, architects have more stringent licensing, educational, and professional standards. Finally, a limit on an architect's liability encourages design creativity and experimentation.

The reasons discussed above clearly justify different treatment under the statute of repose for manufacturers or suppliers like Federal Pacific and architects like Sert Jackson. Federal Pacific has failed to demonstrate that the statute does not further any legitimate state interest or that no rational basis exists to support the statute. No fundamental right or suspect classification is involved. Therefore, where the reasons for providing the protection of the statute to architects but not to suppliers are rationally related to the legitimate public purpose of limiting the duration of liability in certain circumstances, the statute is plainly constitututional. Consequently, this Court should deny Federal Pacific's petition for a writ of certiorari.

II. Federal Pacific Has Not Sufficiently Demonstrated a Conflict Between Decisions of Highest State Courts Concerning a Federal Question.

In its petition, Federal Pacific argues that this Court should grant Federal Pacific's petition for a writ of certiorari because a conflict exists among various jurisdictions concerning the constitutionality of state statutes of repose. However, Sert Jackson

contends that Federal Pacific has not sufficiently demonstrated such a conflict because only one case cited by Federal Pacific invalidates the statute of repose exclusively on federal equal protection grounds.

Courts in a number of other states have examined equal protection challenges to their statutes of repose and found them to be constitutional. *See generally Carter* v. *Hartenstein*, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971); *Salinero* v. *Pon*, 124 Cal. App. 3d 120, 177 Cal. Rptr. 204 (1981); *Cudahy Co.* v. *Ragnar Benson, Inc.*, 514 F. Supp. 1212 (D. Colo. 1981) (applying Colorado law); *Cheswold Volunteer Fire Co.* v. *Lambertson Construction Co.*, 489 A.2d 413 (Del. 1984); *Britt* v. *Schindler Elevator Corp.*, 637 F. Supp. 734 (D.D.C. 1986) (applying District of Columbia law); *Mullis* v. *Southern Company Services, Inc.*, 250 Ga. 90, 296 S.E.2d 579 (1982); *Twin Falls Clinic & Hospital Building Corp.* v. *Hamill*, 103 Idaho 19, 644 P.2d 341 (1982); *Beecher* v. *White*, 477 N.E.2d 622 (Ind. App. 1983); *Burmaster* v. *Gravity Drainage District No. 2*, 366 So.2d 1381 (La. 1978); *Whiting-Turner Contracting Co.* v. *Coupard*, 304 Md. 340, 499 A.2d 178 (1985); *O'Brien* v. *Hazelet & Erdal*, 410 Mich. 1, 299 N.W.2d 336 (1980); *Reeves* v. *Ille Electric Co.*, 170 Mont. 104, 551 P.2d 647 (1976); *Howell* v. *Burk*, 90 N.M. 688, 568 P.2d 214 (App. 1977), *cert. den.*, 91 N.M. 3, 569 P.2d 413 (1977); *Lamb* v. *Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983); *Elizabeth Gamble Deaconess Home Assn.* v. *Turner Construction Co.*, 14 Ohio App. 3d 281, 470 N.E.2d 950 (1984); *Van Den Hul* v. *Baltic Farmers Elevator Co.*, 716 F.2d 504 (8th Cir. 1983) (applying South Dakota law); *Harmon* v. *Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522 (Tenn. 1981); *Sowders* v. *M. W. Kellogg Co.*, 663 S.W.2d 644 (Tex. App. 1983, writ ref'd n.r.e.).

In addition to the reasons articulated in *Klein*, several states have relied on additional reasons for permitting distinctions between architects and suppliers. For example, in *Beecher* v.

White, *supra*, an Indiana court found it was permissible to treat architect and design professionals differently because design professionals are subject to licensing, educational and professional standards which provide some measure of protection to the public. *See also*, *O'Brien* v. *Hazelet & Erdal*, *supra*.

In its petition, Federal Pacific states that nine jurisdictions have found statutes of repose for architects and design professionals to be unconstitutional.[5] (*See* petition, p. 10) However, in three of the cases cited by the petitioner in which a statute of repose was found to be unconstitutional, the state courts did not explicitly rely on federal equal protection grounds in order to invalidate the statute. *See Pacific Indemnity Co.* v. *Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977) (statute unconstitutional because it grants a special immunity without a rational basis); *Plant* v. *R. L. Reid, Inc.*, 294 Ala. 155, 313 So.2d 518 (Ala. 1975) (statute void for vagueness, indefiniteness, and uncertainty); and *Skinner* v. *Anderson*, 38 Ill.2d 455, 231 N.E.2d 588 (1976) (statute violates state constitutional provision that legislature shall not grant special immunity).

In addition, in five cases, the state courts relied on both federal and state grounds to invalidate the statutes. *See McClanahan* v. *American Gilsonite Co.*, 494 F. Supp. 1334 (D. Colo. 1980) (violation of federal equal protection clause and state constitutional provision prohibiting laws granting special immunity); *Shibuya* v. *Architects Hawaii, Ltd.*, 65 Hawaii 26, 647 P.2d 276 (1982) (decision rested on state equal protection provision, with guidance from decisions of U.S. Supreme Court); *Henderson Clay Products, Inc.* v. *Edgar Wood & Associates, Inc.*, 122 N.H. 800, 451 A.2d 174 (1982) (violation of federal and state equal protection provisions); *Fujioka* v. *Kam*, 55 Hawaii 7, 514 P.2d 568 (1973) (violation of federal and state equal protection provisions); *Broome* v.

[5] Federal Pacific actually cites ten jurisdictions where the statute of repose was found to be invalid.

Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978) (violation of state and federal equal protection provisions). In only one case cited by Federal Pacific was the finding of a violation of the federal equal protection clause the sole ground for invalidating the statute. *See Loyal Order of Moose, Lodge 1785* v. *Cavaness*, 563 P.2d 143 (Okla. 1977).[6]

In the instant case, Federal Pacific argues that this Court should grant a writ of certiorari because there is a conflict between jurisdictions on this issue. (Petition, p. 10) However, Sert Jackson contends that the conflict is illusory where essentially all but one of the cases cited by Federal Pacific rely either exclusively on state grounds or jointly on federal and adequate and independent state grounds and only one relies exclusively on federal grounds.[7] Consequently, Federal Pacific has not sufficiently demonstrated a conflict on the basis of a federal question, and under these circumstances, this Court should not grant the petition for certiorari.

The majority of jurisdictions have found such statutes to be constitutional. *See* Heller, *The District of Columbia's Architects' and Builders' Statute of Repose: Its Application and Need for Amendment*, 34 Cath. U. L. Rev. 919, 968 (1985) Furthermore, the U.S. Supreme Court has previously dismissed an appeal for want of a substantial federal question, where the state court decision upheld a statute of repose against, *inter alia*, a federal equal protection challenge. *See Carter* v. *Hartenstein*, *supra*.

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[6] In one case cited by Federal Pacific, the state court simply noted that the trial court had invalidated the statute on equal protection grounds and that this holding was not challenged on appeal. The decision thus contained no analysis of the finding of an equal protection violation, nor did it indicate whether state or federal equal protection provisions were the basis of the decision. *See Hartford Fire Ins. Co.* v. *Osborn Plumbing & Heating, Inc.*, 66 Wis.2d 454, 225 N.W.2d 628 (1975).

[7] Where adequate and independent state grounds support a state court judgment, the U.S. Supreme Court is deprived of jurisdiction to review the state court judgment. *See Michigan* v. *Long*, 463 U.S. 1032 (1983) and *Zacchini* v. *Scripp-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

Where Federal Pacific has not sufficiently demonstrated that a conflict exists among state court decisions concerning a federal question, this Court should not grant a petition for a writ of certiorari.

Conclusion

For the reasons discussed above, respondent Sert, Jackson and Associates, Inc. respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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